FILED
JUN 25 1993
OFFICE OF THE CLERK

No. 92-1798

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

LEE RAKESTRAW *et al.*,
Petitioners,
v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL
and UNITED AIR LINES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION OF RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

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BRIEF IN OPPOSITION OF RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

In 1991, respondents Air Line Pilots Association, International ("ALPA") and United Air Lines, Inc. ("United") agreed to restore their historic practice of providing all pilots with competitive seniority positions in order of the date pilots began pilot training at United. This collective bargaining agreement reinstates full seniority rights of pilots previously denied those rights by United for participating in a 1985 pilot strike and removes a special seniority preference granted to strike replacements. As a result, all United pilots now maintain competitive seniority rights on the same basis.

The Seventh Circuit held that ALPA did not violate its duty of fair representation under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, in negotiating this 1991 agreement. In reaching this result, the court applied the tripartite duty of fair representation standard recently reaffirmed in *Air Line Pilots Ass'n, Int'l* v. *O'Neill,* 499 U.S. 65, 111 S.Ct. 1127 (1991), confirmed longstanding union authority to protect strikers from employer discrimination through collective bargaining, and rejected petitioners' claim that expected post-strike hostility between strikers and strike replacements disables a union from negotiating to restore "a uniform rule of seniority for all pilots." (App. 2). We show below that the Seventh Circuit's decision raises no issue concerning the administration of the fair representation doctrine by the lower courts, is fully consistent with *O'Neill* and this Court's prior fair representation decisions, and thus presents no question that warrants review.

COUNTERSTATEMENT OF THE CASE

Because the petition has substantially mischaracterized this litigation, we begin with a fuller description of the factual background and the opinions below.

Statement of Facts

The case involves a group of United pilots known as the "Group of 570" who were selected, trained and offered employment by United in late 1984 and 1985 while ALPA and United were engaged in collective bargaining. Prior to these negotiations, all new United pilots were placed on the payroll and ranked on the pilot seniority list in order of the date they began training rather than the later date they became statutory "employees" under the RLA by flying United aircraft in passenger operations. (App. 6, 40-41). In a disputed departure from this practice, United refused to place the Group of 570 on the payroll during training. "[I]n terms of seniority," however, "the 570 were treated like

past student pilots; they received conditional seniority numbers based on their initial day of training." (App. 40).[1]

United initially assured the Group of 570 that they would not be required to cross ALPA picket lines and unconditionally offered employment to all 570 pilots. (App. 41). As a May 17, 1985 strike deadline approached, however, United threatened to discharge any Group of 570 pilot who refused to work during the strike. (App. 6, 41). ALPA urged the Group of 570 to join the strike and pledged to continue its efforts to require United to recognize the 570 as pilots with seniority based on their initial training dates. (App. 6-7). When the strike began, 31 pilots in the Group of 570 went to work for United. (App. 6). Those pilots retained seniority numbers based on their initial day of training in 1984 or 1985 and received seniority dates of May 17, 1985. (App. 57). United discharged every Group of 570 pilot who joined the strike. (App. 6).

United also hired 539 replacement workers (the "Group of 539") during the strike, including both "fleet qualified" pilots such as the petitioners and student trainees who were never required to work during the strike. (App. 6-7, 41-42, 49). United promised petitioners post-strike employment and a substantial premium pay bonus over all other pilots. (App. 6-7, 41-42). However, United did *not* promise petitioners any special seniority rights and specifically informed them that they would be subject to the collectively-bargained seniority system following the strike. (App. 6-7, 23, 42-47, 79-80). The petitioners and all other strike replacements

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[1] A United pilot's seniority *number* ranks his or her relative seniority position on the pilot system seniority list for seniority-based competitive bidding for pilot positions, monthly flight schedules, vacations and other employment benefits. (App. 43). A United pilot's seniority *date* measures a pilot's length of service for other purposes such as company-wide competition for flight passes.

received seniority numbers based on their initial training dates rather than the later dates they began to operate United aircraft.

The strike ended on June 15, 1985. (App. 50). In the negotiations to end the strike, ALPA sought an agreement requiring United to recall the Group of 570 with seniority rights based on their first day of training (and thus ahead of petitioners and other pilots who entered training during and after the strike). (App. 7). When United refused, ALPA obtained a district court order under the RLA under which United recalled the Group of 570 with seniority rights based on their initial training dates. (App. 7). On appeal, however, the Seventh Circuit vacated the 1985 recall order, holding that the Group of 570 were not statutory "employees" protected by the RLA when they joined the strike. (App. 8).

Following the Seventh Circuit's decision, United threatened to fire the Group of 570 unless ALPA agreed to reduce their seniority below the Group of 539. (App. 8-9, 54). As the courts below found, United insisted on this 1987 seniority revision in order to "punish the 570 for striking" (App. 57), to undermine ALPA's ability to engage in future self-help, and to grant all strike replacements a special seniority preference over the 570 as a reward for siding with management in the 1985 strike. (App. 8-9). Once United imposed the 1987 seniority revision, the Group of 570 became the *only* United pilots whose positions on the United pilot seniority list were not based on their first day of training. (App. 8-9).[2]

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[2] Under the 1987 seniority revision, all *nonstriking* pilots in the Group of 570 maintained seniority ahead of the Group of 539 with seniority numbers based on their initial day of training while all *striking* 570 pilots had their seniority positions artifically reduced below the 539. (App. 57). As part of this effort to punish the Group of 570, United also insisted that ALPA waive its right to demand that United restore the full seniority of the 570 in future negotia-

From 1987 through 1991, ALPA publicly and repeatedly informed the United pilot group that the union would seek United's consent to eliminate the discriminatory 1987 seniority revision, to restore what ALPA regarded as the full seniority of the 570, and to remove the seniority preference first received by the Group of 539 in 1987. (App. 59, 74-75). United finally agreed to rescind the 1987 seniority revision in the parties' 1991 collective bargaining agreement. (App. 9, 63). The 1991 agreement thus reinstates the traditional seniority system that existed at United prior to 1987 so that every pilot—whether striker or nonstriker—maintains a seniority number and a position on the pilot seniority list based on his or her initial training date. (App. 9, 62-63).

Course of Proceedings

In the ensuing litigation against ALPA and United, the district court sustained petitioners' fair representation claim, held that petitioners did not maintain any individual agreements with United concerning seniority rights, and dismissed all remaining claims against ALPA and United. (App. 74-84).

The district court found that ALPA and United maintained "a rational basis" for the 1991 agreement (App. 75), that ALPA had pursued a "legitimate goal in attempting to remedy United's past punishment" of the 570 (App. 74), and that the 1991 agreement in fact restores the parties' longstanding seniority system by providing all pilots with seniority positions based on their initial training dates. (App. 63). The district court nonetheless reasoned that the 1991 agreement constituted illegal "discrimination" under the duty of fair representation, as

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tions or to strike over any such bargaining demand. (App. 8, 22-23). As the district court found, however, "ALPA has always considered itself coerced into signing the 1987 letter agreement, and considered the agreement unfair punishment against those members of the 570 who honored ALPA picket lines." (App. 56-57).

a matter of law, because (1) ALPA "lobbied *on behalf of* the Group of 570 . . . and *against* the fleet qualified pilots" in negotiating to eliminate the 1987 revision (App. 70-71) and (2) because strikers and union officials had expressed general bitterness over the years toward replacement pilots who helped management undermine the 1985 strike. (App. 74-76).

Contrary to the petition (Pet. 18), however, the district court did not (and could not) make any finding that post-strike tensions between strikers and nonstrikers actually or substantially motivated ALPA's six-year campaign to restore the seniority of the 570. (App. 20) (explaining that the district court applied *no* legal standard and made *no* factual finding on this issue). Instead, the district court reached the unprecedented conclusion that *any* attempt to renegotiate the 1987 seniority revision constituted "bad faith," as a matter of law, because "once union and management settle a dispute about seniority, the union's duty of fair representation prevents reopening the issue—for the only outcome is to prefer one group of employees over another in a zero-sum game." (App. 10).

A unanimous panel of the Seventh Circuit reversed in an opinion by Judge Easterbrook that plainly articulates and applies the entire tripartite duty of fair representation standard developed by this Court in the line of cases culminating in *O'Neill*. (App. 10-11). Because that standard—like other legal rules—is not "self defining" (App. 11), the court undertook a detailed analysis of the principles involved in the Court's fair representation decisions (App. 11-16) and separately evaluated and rejected each of petitioners' specific claims that the 1991 agreement was "arbitrary," "discriminatory" or negotiated in "bad faith." (App. 10-14, 19-23).

The Seventh Circuit also held that ALPA's attempt to restore the seniority of the 570 and to rescind the

seniority preference conferred on petitioners in 1987 is not "evidence of forbidden motive" under federal labor law (App. 15), that an alleged " 'bad' motive does not spoil" a uniform seniority system based on initial training dates that does *not* discriminate between strikers and nonstrikers (App. 20), and, in any event, that the district court in this case did not (and could not) find that ALPA's alleged institutional hostility to strike replacements was a "but for" or motivating cause of ALPA's six-year effort to restore the full seniority of the 570 and to reinstate "the normal seniority arrangements at United." (App. 20). The court thus concluded that an "agreement that rationally serves the interests of workers as a whole, and that treats employees who are pariahs in the union's eyes no worse than it treats similarly situated supporters of the union" is not "arbitrary," "discriminatory" or evidence of "bad faith" under the *O'Neill* standard. (App. 20).[3]

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[3] Two judges dissented from the Seventh Circuit's subsequent denial of a petition for rehearing en banc. (App. 27-33). The dissenters principally criticized Judge Easterbrook's writing style and faulted Judge Easterbrook for failing to separately address each individual element of the *O'Neill* standard. (App. 29-31). While the dissenters argued that isolated phrases in the opinion below threatened to blur the distinction between "arbitrary" and "discriminatory" or "bad faith" conduct under *O'Neill*, they neither defended the district court's decision nor disputed the panel's conclusion that ALPA's effort to restore the full seniority of the 570 in this dispute was well within its duty of fair representation.

ARGUMENT

The petition offers two principal reasons for granting plenary review of this intensely fact-bound decision: (1) that the opinion below creates a "conflict" among the Circuits by failing to follow the tripartite fair representation standard reaffirmed in *O'Neill* (Pet. 9-11) and (2) that the Seventh Circuit's application of the *O'Neill* standard to the specifics of this case is otherwise inconsistent with this Court's fair representation cases. (Pet. 12-18). Petitioners are plainly wrong on both counts.

I. THE DECISION BELOW APPLIES THE PROPER LEGAL STANDARD AND CREATES NO CONFLICT AMONG THE CIRCUITS

1. First, the court of appeals unmistakably applied the proper fair representation standard under *O'Neill.*

As this Court has repeatedly explained, the system of collective bargaining created by the federal labor statutes requires unions to pursue collective interests in labor contracts that often benefit one group of employees at the expense of another. *See Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 337-38 (1953). As "a purposefully limited check" on a union's legislative function as collective bargaining agent, *see United Steelworkers of Am.* v. *Rawson,* 495 U.S. 362, 374 (1990), the Court has crafted the duty of fair representation to proscribe arbitrary, discriminatory or bad faith union decisionmaking that lacks any legitimate basis under federal labor law. *See Vaca* v. *Sipes,* 386 U.S. 171, 177 (1967); *Humphrey* v. *Moore,* 375 U.S. 335, 349 (1964). In *O'Neill,* a case involving claims of arbitrary *and* discriminatory union conduct, the Court clarified that this tripartite standard "applies to all union activities, including contract negotiation." *O'Neill,* 111 S.Ct. at 1130. The Court explicitly cautioned, however, that this standard must be developed and applied on a case-by-case basis to serve

the underlying policies and principles of federal collective bargaining law. *See id.* at 1135-36.[4]

The opinion below followed both the standards and principles of *O'Neill* and this Court's prior fair representation cases. The Seventh Circuit thus held that "a union breaches its duty of fair representation if its actions are 'arbitrary, discriminatory, or in bad faith,' " (App. 11) (quoting *Vaca,* 386 U.S. at 190), and carefully canvassed the principal decisions of this Court to apply the entire tripartite *O'Neill* standard and to reject each of petitioners' specific challenges to the 1991 agreement (App. 11-15).

In particular, the court concluded that the 1991 seniority adjustment was not "arbitrary" or "irrational" under *O'Neill* because it reinstates the uniform seniority system based on initial training dates "that had been in place for many years" prior to 1987 (App. 20); that the agreement did not constitute the type of invidious discrimination prohibited by the duty of fair representation because unions can legitimately negotiate to "reduce" special "advantages enjoyed by [strike] replactments" as long as the resulting contract treats strikers and nonstrikers equally (App. 21); and that ALPA did not engage in "bad faith" conduct—*i.e.*, deceit or dishonesty—by negotiating to rescind the 1987 seniority revision because petitioners were well aware of ALPA's public efforts to rescind that agreement, and, in any event, maintained no enforceable or vested rights under the 1987 seniority revision. (App. 21-23).

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[4] While the Court did not rule on the "bad faith" claim in *O'Neill* (Pet. 9), the Court has previously held that bad faith requires "substantial evidence of fraud, deceitful action or dishonest conduct." *Humphrey,* 375 U.S. at 348; *see also Amalgamated Ass'n of Street, Elec. and Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 299-301 (1971). The lower courts have also uniformly held that "bad faith" refers to deceitful or dishonest union conduct that defrauds bargaining unit members. *See, e.g., Ooley* v. *Schwitzer Div.,* 961 F.2d 1293, 1303 (7th Cir.), *cert. denied,* 113 S.Ct. 208 (1992); *O'Neill* v. *Air Line Pilots Ass'n, Int'l,* 939 F.2d 1199, 1202-07 (5th Cir. 1991).

Accordingly, the opinion below does not create any new rule that permits unions to engage in *any* conduct with a rational basis, however invidious or irrelevant to legitimate unions concerns (Pet. 9-10; Amicus Br. 5-6).[5] So, too, Judge Easterbrook's references to the words of the fair representation standard as "conclusions," "buzzwords" or "epithets" (App. 11, 15) do not criticize or "disparage" *O'Neill.* (Pet. 6, 9). Instead, the court of appeals simply (and properly) recognized that the words "arbitrary," "discriminatory" or "bad faith" are not talismanic substitutes for judicial analysis. Dissatisfied bargaining unit members can always assert that their union "discriminated" against them (*i.e.,* treated them differently than others) and, as do petitioners here, "insist that the distinction must have been part of a 'bad faith' plot to 'penalize' them on account of [their] status." (App. 13). The fair representation doctrine, in turn, requires the lower courts to examine all such claims of "arbitrary," "discriminatory" or "bad faith" conduct against the broader universe of legal rules governing labor unions in order to distinguish illicit penalty from permissible union choice. (App. 15-16).

This decision is entirely consistent with *O'Neill* and the Court's prior fair representation decisions, none of which establishes a rigid formula for adjudicating fair representation claims divorced from content and context. *See, e.g., O'Neill,* 111 S.Ct. at 1136; *Humphrey,* 375 U.S. at 349 (explaining that the existence of "antagonistic

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[5] The court of appeals explained, for example, that the tripartite *O'Neill* standard prohibits unions from "tak[ing] away the seniority of some employees for no reason other than . . . that they opposed the union's leadership," "sell[ing] an employee down the river for . . . a reason forbidden on substantive grounds, such as race or internal union politics," and "disfavor[ing] those among its members who voted against its officers in the last election." (App. 11-12). So, too, the court below explained that the duty of fair representation prohibits unions from discriminating against replacements by negotiating wage scales that treat replacements worse than similarly situated strikers. (App. 16).

interests among employees does not mean that a union breaches the duty "in taking a good faith position contrary to that of some individuals").

2. Second, whatever their criticism of Judge Easterbrook's writing style, petitioners can make no claim that the decision below creates a "conflict" between the Seventh Circuit and any other Circuit concerning the application of *O'Neill*. (Pet. 10-12). Both petitioners (Pet. 11 n.7) and the dissent from the denial of rehearing en banc (App. 29, 31) correctly note that the Seventh Circuit has issued a number of post-*O'Neill* opinions that present and apply the tripartite fair representation standard in the expository format preferred by petitioners. Some of those decisions have found liability under *O'Neill*; others have not. *See, e.g., Souter* v. *United Auto Workers*, 143 L.R.R.M. (BNA) 2269 (7th Cir. 1993) (determining that union's refusal to pursue a grievance was not arbitrary, discriminatory or undertaken in bad faith); *Ooley*, 961 F.2d at 1302-04 (concluding that a union acted in bad faith but that the plaintiff suffered no injury); *Bennett* v. *Local Union No. 66, Glass Workers Union Int'l*, 958 F.2d 1429, 1436-37 (7th Cir. 1992) (affirming a finding of unlawful discrimination and bad faith). Taken as a whole, however, the Seventh Circuit's fair representation jurisprudence following *O'Neill*, including the present case, is indistinguishable from that of any other Circuit.[6]

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[6] The lower courts have uniformly applied the tripartite *O'Neill* standard to reject claims of "discrimination" and "bad faith" where, as here, a union's decision concerning competing seniority claims promotes the interests of one employee group over another. *See, e.g., Allen* v. *United Transp. Union*, 964 F.2d 818, 821 (8th Cir. 1992); *Marshall* v. *Local Union No. 6, Brewers and Gen. Labor Dep'ts*, 960 F.2d 1360, 1370 (8th Cir. 1992); *Ackley* v. *Local Union 337, IBT*, 948 F.2d 267 (6th Cir. 1991); *O'Neill* v. *Air Line Pilots Ass'n, Int'l*, 939 F.2d 1199, 1201-06 (5th Cir. 1991); *Gvozdenovic* v. *United Air Lines, Inc.*, 933 F.2d 1100, 1106-07 (2d Cir.), *cert. denied*, 112 S.Ct. 305 (1991).

Petitioners thus do not and cannot point to any conflict among the Circuits over the proper application of *O'Neill* to the strike settlement issues presented in this case.

II. THE SEVENTH CIRCUIT'S DECISION IS FULLY CONSISTENT WITH THIS COURT'S DUTY OF FAIR REPRESENTATION DOCTRINE

As they did below, petitioners contend that the 1991 agreement (1) constitutes illegitimate "discrimination" or "bad faith" because it benefits the Group of 570 and removes a preference previously granted to strike replacements, (2) is "arbitrary" or "irrational" because it revises existing seniority rights in the absence of an intervening event, and (3) unlawfully "penalizes" petitioners because strikers and union officials have expressed animosity towards pilots who sided with management and attempted to take their jobs during the 1985 strike. (Pet. 12-19). The Seventh Circuit properly rejected each of these claims.

1. First, both petitioners and amicus have distorted the Seventh Circuit's actual discrimination holding by claiming that the opinion below permits unions to engage in "terror tactics" (Amicus Br. 17) or "deliberately . . . punish" (Pet. 12) strike replacements simply to enhance union power. (Pet. 12-13; Amicus Br. 17). In fact, the court below *only* held that the duty of fair representation permits unions to eliminate *management* discrimination so as to restore a uniform post-strike seniority system that treats nonstrikers "no worse than it treats similarly situated supporters of the union." (App. 20).

This holding is rooted in settled principles of federal collective bargaining law. The federal labor statutes permit employers to discriminate in limited respects against strikers and in favor of nonstrikers as a means of inducing strike replacements to work during a strike. *See, e.g., Trans World Airlines, Inc.* v. *Independent Fed'n of Flight*

Attendants, 489 U.S. 426, 437-38 (1989) (holding that the RLA permits employers to grant seniority preferences to nonstrikers as part of the "arsenal of economic weapons available to employers during a period of self-help"). That being so, the Court has long recognized that federal labor law permits unions to rescind such discriminatory treatment of strikers and nonstrikers through collective bargaining. *See Trans World*, 489 U.S. at 439 (explaining that unions typically negotiate to remove seniority preferences granted strike replactments and that "such agreements are typically one mark of a successful strike"); *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 513-14 (1983) (Blackmun, J., concurring) (same).

Any contrary interpretation of the duty of fair representation would make it virtually impossible to settle strikes since all unions negotiate to protect strikers in post-strike collective bargaining. *See NLRB* v. *Curtin-Matheson Scientific, Inc.*, 494 U.S. 775, 790-91 (1990) (explaining that unions routinely demand that employers discharge strike replactments to create jobs for returning strikers). So, too, petitioners' "discrimination" theory would improperly alter the existing balance of self-help rights by permitting employers to penalize strikers and reward nonstrikers during a strike while permanently prohibiting unions from negotiating to restore a level playing field. (App. 14-15).

Petitioners do not and cannot point to any fair representation principle or decision that supports such results. To the contrary, in *O'Neill* itself, the Court held that ALPA enjoyed wide discretion to determine the extent to which it would negotiate to protect strikers from employer discrimination and to remove the seniority preference enjoyed by nonstrikers. *See O'Neill*, 111 S. Ct. at 1131. As the court below explained, "[t]hat [holding] must entail the conclusion that the effort to aid one group [strikers] at the expense of another [nonstrikers] is not *itself* arbitrary or in bad faith." (App. 15). ALPA's

attempt to "restore a uniform rule of seniority for all pilots" (App. 2) thus did not constitute " 'invidious discrimination' of the kind prohibited by the duty of fair representation." *O'Neill*, 111 S.Ct. at 1137.[7]

2. The Seventh Circuit also properly rejected petitioners' claim that the 1991 agreement was "arbitrary" because it did not follow a corporate merger or because the Group of 570 had not attained statutory "employee" status prior to the strike. (Pet. 13-17). Seniority adjustments are not presumptively "irrational" under the duty of fair representation in the absence of an "intervening event" such as a corporate merger. (Pet. 13, 14). As the court of appeals explained, "seniority does not 'belong' to any employee"; it "is a creation of collective bargaining agreements and equivalent contracts between unions and employers." (App. 21). *See Aeronautical Indus. Dist., Lodge 727* v. *Campbell*, 337 U.S. 521, 526 (1949). As a result, unions are not subject to any distinct, especially strict duty of fair representation standard when they negotiate to revise existing seniority rights in the absence of a corporate merger. *See, e.g., Huffman*, 345 U.S. at 333-34, 337-39 (upholding a union's deci-

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[7] The court of appeals also correctly rejected the district court's purely legal conclusion that ALPA acted in "bad faith" under the duty of fair representation when it "ignored its commitment to never reopen the 570 seniority issue." (App. 76 n.14). To demonstrate "bad faith" under the duty of fair representation, petitioners must establish that ALPA intended to deceive or defraud them (and succeeded in doing so) when it acquiesced in the finality language of the 1987 seniority revision. *See Lockridge*, 403 U.S. at 299-300; *Humphrey*, 375 U.S. at 349-50. From 1987 through 1991, however, ALPA repeatedly informed all pilots that the union had reluctantly adopted the 1987 agreement (including its finality language) to save the jobs of the 570, that it believed that the 1987 agreement unfairly punished the 570 for joining the strike, and that it would continue to pursue the full seniority rights of the 570 in every available forum. (App. 56-57). As the court of appeals explained, it is inconceivable that ALPA engaged in "bad faith"—*i.e.*, fraud or deceit—by repeatedly and openly campaigning for over four years to rescind the 1987 seniority revision. (App. 21-22).

sion to renegotiate pre-existing contractual seniority rights in the absence of any merger or other "intervening" event).[8]

Indeed, the point of *O'Neill* itself is that a collectively bargained revision of seniority rights, like the negotiation of any other labor contract provision, is only "arbitrary" if it falls "so far outside a 'wide range of reasonableness' that is it wholly 'irrational.' " *O'Neill*, 111 S.Ct. at 1135-36 (citation omitted). The 1991 agreement is not "wholly irrational" under this standard since it re-establishes a uniform seniority system for all pilots based on initial training dates and provides the Group of 570 with the competitive seniority rights that they held prior to 1987. (App. 9, 20, 59). Even the district court found that ALPA and United maintained "a rational basis" for this agreement. (App. 75).

Nor is the rationality of the 1991 agreement nullified by the fact that the 570 were not statutory "employees" under the RLA during the 1985 strike because they had not yet operated United aircraft. (Pet. 16). The duty of fair representation does not require ALPA and United to adopt a seniority system based on the statutory requirements for "employee" status. *See Huffman*, 345 U.S. at 342-43 (upholding a seniority adjustment granting certain employees seniority positions on the basis of past military service rather than employee status). Indeed,

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[8] The Seventh Circuit's earlier decision in *Barton Brands Ltd.* v. *NLRB*, 529 F.2d 793 (7th Cir. 1976), does not impose any special duty of fair representation standard when a union negotiates to revise seniority rights outside the merger context. (Pet. 14). To the contrary, *Barton Brands* squarely held that while seniority adjustments "may not be made *solely* for the benefit of a stronger, more politically favored group over a minority group," *Barton Brands*, 529 F.2d at 798-99, a union is "absolved of liability" under the duty of fair representation where, as here, it "can show *some objective justification* for its conduct" *Id.* at 800 (emphasis added). The court of appeals clearly applied *Barton Brands* to this case. (App. 21-22).

the seniority positions of petitioners and all other United pilots have always been based on the date they entered pilot training—not the date they attained "employee" status. (App. 9, 20, 59).

3. Finally, the Seventh Circuit correctly held that post-strike hostility between strikers (including union officials) and strike replacements did not nullify ALPA's legitimate and rational effort to restore the seniority of the 570. (App. 20-22). In attacking this holding, petitioners and amicus proceed as if the district court found that ALPA's extended effort to protect the 570 and to rescind the 1987 seniority revision was no more than an animus-driven campaign to "punish" petitioners (Pet. 12-13) and that ALPA's proffered rationale for negotiating the 1991 agreement was merely a "pretext" for this "bad" motive. (Pet. 18-19; Amicus Br. 18).[9]

As the court of appeals explained, however, the district court made *no* such findings in this case; its opinion does not even mention the words "pretext" or "mixed motive." (App. 20). Instead, the district court concluded as a matter of law that any union-negotiated seniority adjustment that benefits strikers at the expense of nonstrikers is unlawful whenever nonstrikers can point to institutional union hostility toward strike replacements. (App. 70-74 & n.11). The Seventh Circuit properly rejected this "hostility" theory for three related reasons.

First, the court below correctly concluded that ALPA's motives—mixed or otherwise—were legally irrelevant to measuring the union's conduct under the duty of fair

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[9] In the footnote repeatedly cited by the petitioners for this proposition, the district court questions the uniformity of the 1991 agreement because the 570 have received seniority *dates* of May 17, 1985 and not their *earlier* training dates. (App. 70 n.11). However, a pilot's seniority *number*—not his or her seniority *date*—determines competitive seniority rights (App. 43), and the district court explicitly found that "the 570 will receive . . . relative seniority numbers based on their initial day of training" like all other United pilots under the 1991 Agreement. (App. 63; *see* App. 9).

representation because the seniority system created by the 1991 agreement does not discriminate in fact between strikers and nonstrikers. (App. 20). The 1991 agreement "restore[s] the normal seniority arrangements at United . . . that had been in place for many years at United" and treats petitioners "no worse than it treats similarly situated supporters of the union." (App. 20). Petitioners' hyperbolic attack on ALPA's bona fides thus establishes at most a "discriminatory motive without a discriminatory rule" (App. 15)—a finding that does not support a breach of the duty of fair representation. *Cf. Palmer* v. *Thompson,* 403 U.S. 217, 225-26 (1971) (holding that allegedly improper motives are irrelevant under equal protection analysis where, as here, the result of the disputed decision is to treat all groups equally).

Second, ALPA in fact negotiated the 1991 agreement with dual motives—it sought to restore the pre-strike seniority system by rescinding management's punishment of the Group of 570 under the 1987 seniority revision *and* to remove the special seniority preference petitioners and others received in 1987. (App. 20-21). As the court below explained, however, *both of these motives were entirely lawful* since a union can legitimately negotiate to rescind the preferences received by replacement workers and to ensure fair and uniform treatment of strikers and nonstrikers. (App. 21-22). Labelling ALPA's effort to eliminate the 1987 seniority revision a campaign to "punish" petitioners (Pet. 12) does not transform ALPA's lawful effort to rescind the seniority preference into a "bad motive." (App. 16). As a result, ALPA's intentional effort to resecind petitioners' seniority preference does not constitute "evidence of forbidden motive" under the duty of fair representation (App. 15), and the entire "mixed motive" and "pretext" discussion in the petition is inapposite.

Third, the court of appeals properly rejected the district court's view that general hostility between strikers

and nonstrikers permanently prohibited ALPA from negotiating to rescind the 1987 seniority revision. This "general hostility" theory would mean that a union breaches the duty whenever it negotiates a labor contract that does not conform to the expectations of nonstrikers. Every strike creates hostility between strikers and nonstrikers, *see NLRB* v. *Curtin-Matheson Scientific, Inc.*, 494 U.S. 775, 809-11 (1990) (Scalia, J., dissenting); *Trans World*, 489 U.S. at 437, and strike replacements can always point to post-strike tensions or statements by individual union members or union officials that criticize or express contempt for strike replacements, *see Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers* v. *Austin*, 418 U.S. 264, 283-84 (1974). As in this case, nonstrikers thus can always claim that *any* union conduct that they do not like breaches the duty of fair representation because they have been subject to general union hostility. (App. 20-21).

In adjudicating analogous hostility claims, the lower courts have uniformly and properly rejected the view that employees can prove a breach of the duty simply from general or institutional hostility and have instead required fair representation plaintiffs to establish a direct and substantial causal connection between alleged institutional hostility and the disputed union conduct. *See, e.g., Ash* v. *United Parcel Serv., Inc.*, 800 F.2d 409, 411 (4th Cir. 1986); *Freeman* v. *O'Neal Steel, Inc.*, 609 F.2d 1123, 1127 (5th Cir.), *cert. denied*, 499 U.S. 833 (1980). Here, the court of appeals properly determined that institutional "antipathy" between the union and strike replacements was an insufficient basis to invalidate the 1991 agreement since ALPA had in fact pursued independent and wholly legitimate goals in negotiating the 1991 seniority adjustment. (App. 21). The plaintiffs thus failed to establish—and the district court did not find—that any general hostility between strikers and nonstrikers was an actual, substantial or motivating cause of

ALPA's campaign to restore the full seniority of the 570 or that this effort was a mere "pretext" to injure petitioners. (App. 21-22).[10]

This unremarkable causation holding provides no basis for reviewing the decision below. *Cf. Mt. Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 284-87 (1977); *United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 714-17 (1983).[11]

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[10] For this reason as well, this case thus does not present any vehicle for considering whether the form of "mixed motive" or "pretext" analysis designed to serve distinct statutory purposes under Title VII or the Equal Protection Clause should be imported wholesale into the duty of fair representation doctrine. *Cf. Trans World*, 489 U.S. at 439 (cautioning against the reflexive application of other statutory schemes to RLA disputes).

[11] The amicus brief in support of the petition asserts that petitioners are immune from ALPA's legitimate and rational collective bargaining goals because they maintained immutable, individual seniority rights that "were introduced by agreement between United's management and individual pilots who were . . . entitled to act on their own, for their own ends" (Amicus Br. 13), and because "the replacements in this case were dealing *for themselves as individuals*" (Amicus Br. 14). In fact, both the court of appeals and the district court specifically held that petitioners did *not* maintain any individual agreements with United concerning their seniority relative to the Group of 570. (App. 23, 79-80). Petitioners have not sought review of that holding and have thus abandoned the individual contract claim that underlies the colorful musings of the amicus.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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